Williams, Patricia CIV JFHQ-NCR/MDW SJA

From: David Coombs (b) (6)
Sent: Wednesday, April 25, 2012 9:38 PM
To: (b) (6)
Cc: (b) (6)
Subject: RE: 380-5

Ma'am,

Pursuant to your questions earlier today, the Defense wanted to follow-up on two points:

1) Whether AR 380-5 is Punitive

As the Defense argued, AR 380-5 is a punitive regulation. If you look at the section we have been talking about, it is entitled "Corrective Measures and Sanctions." I reproduced the relevant sections below for your review:

Section VII

Corrective Actions and Sanctions

1–20. General

Commanders will establish procedures to make sure that prompt and appropriate action is taken concerning a violation of the provisions of this regulation, especially in those cases involving incidents which can put classified information at risk of compromise, unauthorized disclosure, or improper classification of information. Such actions will focus on a correction or elimination of the conditions that caused or contributed to the incident.

1–21. Sanctions

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a. DA personnel will be subject to sanctions if they knowingly, willfully, or negligently—

(1) Disclose classified or sensitive information to unauthorized persons.

(2) Classify or continue the classification of information in violation of this regulation.

(3) Violate any other provision of this regulation.

b. Sanctions can include, but are not limited to warning, reprimand, suspension without pay, forfeiture of pay, removal, discharge, loss or denial of access to classified information, and removal of original classification authority. Action can also be taken under the Uniform Code of Military Justice (UCMJ) for violations of that Code and under applicable criminal law, if warranted.

c. Original classification authority will be withdrawn for individuals who demonstrate a disregard or pattern of error in applying the classification and sensitivity standards of this regulation.

There is no clearer evidence that this section was entitled to be punitive than the fact that the word "sanctions" is used four times and the word "violation" (or a variation thereof) is used three times.

2) Whether there is a Distinction Between "Intelligence Information" and "Classified and Sensitive" Information

The Government argued that there is a distinction between "intelligence" (as charged under Article 134) on the one hand, and "classified" and "sensitive" information, on the other. In their motion, they argue that "intelligence is not limited only to classified or sensitive information." (p. 7). The Government does not provide any authority to support the view that "intelligence" is not limited to classified or sensitive information (or, otherwise stated, that "intelligence" is broader than classified or sensitive information). They simply point to the Article 104 instruction in the Benchbook, which states that "intelligence" must be true, at least in part. The section does not comprehensively define intelligence. The Government is proceeding from the understanding that "intelligence" is broader than just classified or sensitive information. The Defense does not believe this is true – it submits that "intelligence" is coextensive with classified or sensitive information (at least as charged in this case).

Moreover, the Defense would note that the Government's definition of "sensitive" information is derived from section 5-19 of AR 380-5, which defines sensitive information for the purpose of the Computer Security Act of 1987, not for the purpose of AR 380-5. "Sensitive" information for the purpose of the Regulation is not defined. Thus it appears that when AR 380-5 is using "sensitive" in section 1-21 it is not using this word as a term of art or defined term.

As stated, the Defense believes that "intelligence" (as charged in Article 134) is the same as "classified" and "sensitive" information in AR 380-5. In this respect, the Defense would note the following:

a. AR 380-5: The Regulation's purpose is as follows:

1–1. Purpose

This regulation establishes the policy for the classification, downgrading, declassification, transmission, transportation, and safeguarding of information requiring protection in the interests of national security.

The Regulation is 311 pages long. It covers every conceivable aspect of information assurance. It is difficult to believe that the Army would only intend for this Regulation to cover "classified" and "sensitive" information (and to punish disclosures of such information), but that there would be other "intelligence" out there that the Regulation did not intend to reach. In other words, the Government believes that there is information that does not qualify as "classified" or "sensitive" but that is nonetheless "intelligence." To accept this argument is to accept that the Army has left completely unregulated a whole area of "intelligence" to simply be dealt with otherwise than by regulation.

b. Video Alleged in Specification 2: The Government points to a charged video as being an example of something that falls within "intelligence" but does not fall under "classified" or "sensitive" information within the meaning of AR 380-5. The Defense believes that the video squarely falls within the definition of sensitive information as intended in AR 380-5. Even if we were to accept the definition of sensitive offered by the government ("Any information, the loss,

misuse, or unauthorized access to or modification of which could adversely affect the national interest or the conduct of federal programs, or the privacy to which individuals are entitled under section 552a of Title 5, USC (the Privacy Act), but which has not been specifically authorized under criteria established by an Executive Order or an Act of Congress to be kept secret in the interest of national defense or foreign policy."), it is clear that the video, as charged, meets the definition of sensitive. The Government has charged PFC Manning with transmitting "information relating to the national defense [the video] ... with reason to believe such information could be used to the injury of the United States or to the advantage of any foreign nation." Thus, the Government believes that the video could be used to the injury of the United States or to the advantage of a foreign nation. It would seem to follow then that the improper release of the video "could adversely affect the national interest" (i.e. the Government's definition of sensitive). There is no information charged that is not classified or sensitive within the meaning of AR 380-5.

c. AR 380-5's Use of "Intelligence Information" – AR 380-5 seems to suggest that "intelligence" is actually synonymous with a subset of classified information. For instance, section D-1 reads:

Security Controls on Dissemination and Marking of Warning Notices on Intelligence Information

D–1. General

Intelligence information will be controlled and marked in accordance with Director of Central Intelligence Directive (DCID) 1/7, "Security Controls on the Dissemination of Intelligence Information", included as figure D–1 of this appendix, and future revisions. Control markings as well as all other policy stipulated in DCID 1/7 apply solely to intelligence information and not to other classified information. Except as specifically stipulated in this appendix, intelligence information will be safeguarded in the same manner as other types of classified information of the same classification level.

This section seems to support the view that "intelligence" (or more specifically "intelligence information") is actually a sub-set of classified information. In other words, it is narrower than classified information, not broader.

In short, the Defense does not believe that "intelligence" is broader than either classified or sensitive information within the meaning of AR 380-5. It was clear what the Army intended to accomplish in enacting AR 380-5: it intended to punish unauthorized disclosures of protected information (whether we call that information "classified"/"sensitive" or "intelligence").

Accordingly, the Defense submits that because there is a punitive regulation which squarely addresses all the charged documents, the offense must be charged as an Article 92 offense and not a 134 offense.

The Government believes that because AR 380-5 does not deal with the specific manner in which information is disclosed (i.e. through the internet), then the regulation is not applicable. This is not the case. AR 380-5, section 1-21a.(1) states that "DA personnel will be subject to sanctions if they knowingly, willfully, or negligently – (1) disclose classified or sensitive information to unauthorized persons." It does not matter how this unauthorized disclosure is carried out (through the internet, over the phone, in person, by email, etc.). What matters is that there is a lawful general regulation that prohibits disclosure of information, however that disclosure is done.

Finally, the Government's email confuses preemption (the Defense's first argument) with the rule in Borunda (the Defense's second argument). The issue of AR 380-5 deals with the latter issue (i.e. the rule in Borunda) and not preemption. Accordingly, the Government's purported distinguishing of McGuinness is inapposite, as that case deals with preemption.

v/r

David

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[redacted]

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-----Original Message-----
From: (b) (6) [redacted]
Sent: Wednesday, April 25, 2012 7:27 PM
To: (b) (6) [redacted]
[redacted]
Subject: 380-5

Ma'am. Ultimately, the United States agrees that AR 380-5 is punitive in nature; however just because a regulation is punitive in nature, not all provisions within the regulation are punitive. For example, AR 25-2 sets forth "bolded" paragraphs which highlight the exact provisions which are punitive. There are portions of AR 380-5 that are punitive in nature, but those provisions follow after Chapter 1, with the specified prohibited conduct, such as storing classified information at a residence (paragraph 7-6), knowingly or willfully disclosing classified information (paragraph

10-11 through -23), or negligently violating the regulation (paragraph 10-10). Specifically, Chapter 1 of AR 380-5 is titled "General Provisions and Program Management." Other provisions within Chapter 1 of AR 380-5 include an explanation of abbreviations and terms (1-3), the responsibilities of the Secretary of the Army (1-4), the scope of the regulation (1-10), background information (1-

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14). Most regulations, like AR 380-5, contain background information on the regulation upfront, to include AR 380-5, para.

1-21. Paragraph 1-21, Subsection (b) thereof sets out the sanctions available for disclosing such information, to include, without limitation, warning, reprimand, action under UCMJ, and action under applicable criminal law. See AR 380-5, para. 1-21b. The United States does not dispute that other provisions contained within AR 380-5 are punitive. See AR 380-5, para.

10-10 (subjecting persons to administrative sanctions if they negligently disclose, to unauthorized persons).

However, if the Court finds Paragraph 1-21 is punitive, then Specification 1 of Charge II is not preempted by Article 92. In addition to what has already been provided in the government's written response and argument today, Paragraph 1-21 does not hold a Soldier criminally responsible for wrongful and wantonly causing intelligence to be published on the internet, but only the knowing, willful, or negligent disclosure of classified or sensitive information to unauthorized persons. In McGuinness, the Court of Military Appeals actually held that the Navy regulation (comparable to AR 380-5) which prohibited storing classified information at an individual's residence was not preempted by a violation of 18 USC 793 for the same type of offense. The Court stated that nothing in the legislative history of Article 92 provided that Congress intended general orders / regulations to occupy the field for offenses that could be charged under Article 134. Although the McGuiness Court applied this standard to a Clause 3 offense (18 USC 793(e)), the United States cannot find any contrary case law which would not apply this to a Clause 1 and 2 offense. Finally, there is no evidence that the Army intended AR 380-5 to cover the field for causing intelligence to be published on the internet or even disclosure of classified, or sensitive information or intelligence to unauthorized individuals, evidenced by multiple other punitive laws/regulations that touch on this subject, such as AR 530-1 (paragraph 2-1), Articles 104, 106a.

In McGuiness, the Court found that paragraph 7-6, AR 380-5 was punitive.

Paragraph 7-4 if found within the same section as paragraph 7-6 and contains similar prohibiting language about storing classified information.

Vr Maj Fein